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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1229

ETTA LEE KELLNER,

Petitioner,

VERSUS

KARNES CITY INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Etta Lee Kellner, Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered October 6, 1976 and for reason would respectfully show:

I.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas, San Antonio Division, attached hereto as Exhibit "A".

II.

JURISDICTIONAL GROUNDS

A. Judgment in this case in the United States Court of Appeals for the Fifth Circuit affirming the District Court judgment was entered on October 6, 1976 without opinion.

B. Rehearing in the Fifth Circuit, en banc, was requested, and was denied November 24, 1976.

C. This Court has jurisdiction to review judgment of the Court below under 28 U.S.C., Section 1254(1).

III.

QUESTION PRESENTED

The question presented for review herein is: Whether Petitioner Kellner has sufficiently stated a prima facie case of a denial of her constitutionally protected "property" and "liberty" interests by the Karnes City Independent School District, et al, so as to avoid an adverse preemptory Summary Judgment as a matter of law.

IV.

FACTS

Petitioner Ms. Etta Lee Kellner, was employed by the Karnes City Independent School District at the beginning of the 1953-54 school year. She has been continually employed by said district since that time, a total of twenty-two years.

She received her Bachelor of Science in Education degree in 1954 from Southwest Texas State Teachers College and her Master of Education from the same college in 1959. She received a Texas Temporary Certified in 1948 to teach in the public schools and received her Texas Permanent Elementary Certificate of the First Class in 1954 at the completion of her B.S. She has attended various subject area conferences to aid her in improving her teaching and keeping abreast of new trends in education.

She is a respected lady of Karnes City. Among the groups of which she is a member are the Order of the Eastern Star for which she served as Worthy Matron, the Delta Kappa Gamma Society International, the Daughters of the American Revolution and the Alpha Pi Chapter of Kappa Pi, an honorary art fraternity. She was also commissioned an Ambassador of Good Will from Texas by the governor of the State of Texas. She is active in her community and was instrumental in establishing the Mexican-American Baptist Mission in Karnes City.

Ms. Kellner is a lady dedicated to her students. The only reason she teaches is that she wants to help children learn. Her financial situation is such that there is no need whatever to work at all.

She is a well-traveled lady. She has taken several trips abroad and incorporates artifacts and experiences from foreign lands

into her teaching and classroom activities, adding a fun, fresh, interesting air to the atmosphere of the classroom.

One of the places she has visited during her vacation time is Bangkok, Thailand. In 1972, she took the American Express Romance Tour to eleven European countries, during which she was able to see the original works of many artists. This was later helpful to her in teaching her art classes. In the summer of 1974, she toured the Holy Land with a group which included group speakers and programs. From each land she visits, Ms. Kellner brings paintings, curios, souvenirs and artifacts which she then uses to enhance her teaching in social studies. For example, she staged a Japanese tea party, complete with native costumes, during a period when the students were studying Japanese culture.

Events Leading up to Her Termination: There were various events which indicated hostility of Superintendent Asman to Ms. Kellner. In the fall of 1969, soon after Mr. Asman came to Karnes City Independent School District, he sent a man to assay Ms. Kellner's new home for school tax purposes. Ms. Kellner was very startled to find that a man was poking around unannounced in her yard, measuring the home, so she commented to Asman that his helpers should be instructed to at least knock on the door of a home to be surveyed, before that survey began. Asman was hostile and unreceptive.

1969-70 was the year Kellner was to receive her twenty-year service pin. The Superintendent balked at the prospect of such, because he had discontinued the practice the previous year and if he gave one to Ms. Kellner, he would need to buy pins for about twelve teachers who had reached their twentieth year the last term. The school board voted unanimously to support continued awards of the service pins.

On or about March 27, 1973, Ms. Kellner spanked Virginia

Barrientz as part of necessary discipline. Mr. Luthringer reprimanded her and took her in his pickup truck to Asman's office so that Asman could also reprimand Ms. Kellner. Asman, when doing so, shook his fist in her face. She was extremely embarrassed and developed a headache from the ordeal. Soon thereafter, Virginia and her mother executed an affidavit stating that the spanking had not been excessive, that Virginia's conduct indicated such discipline was necessary, and Mrs. Barrientz had previously authorized such discipline.

Later that year, Luthringer called Ms. Kellner into his office to reprimand her for the use of other types of posters during the time in which Conservation posters were made by the art students. She attempted to explain that they were being used as examples for the children on placement and proper use of lettering. It was students from her classes that won all the top positions in the competition. They also took all the top positions in the fire and picture memory contests.

In the spring of 1974, Luthringer had Kellner called into the office to discuss his accusation that she had told a Chicano student that the student was on welfare. Kellner explained that what had occurred, in fact, was a reprimand of the entire class for wasting Elmer's Glue, that no student was singled out.

In the fall of 1974, Luthringer came to visit one of Kellner's social studies classes for about fifteen minutes. The students were studying a unit on tropical rain forests. Kellner related an experience she had had in such a forest near Bangkok, Thailand. Luthringer disrupted the class to dispute whether she had actually been there. She had. He then, on or about November 19, 1974, met with her to discuss his evaluation of her classroom performance. Luthringer told her that he would show one (4) (indicating "need improvement"), and commented that he would not mention some clerical errors she had made in computation of a few students' grades. He then told her

that he would recommend her to the school board for re-election. She was later (March 15, 1975), quite shocked to find that he had apparently changed his mind; that she was being terminated. Kellner promptly gave notice of her desire to have a hearing before the Board of Trustees of the Karnes City Independent School District.

The Hearings: The first board hearing on April 7, 1975, was to allow Ms. Kellner and several other teachers who had been recommended for termination, "to present your feelings." No decision was to be made. The only statements given were by witnesses for Kellner. They stated, generally, that she loved children, liked to teach, taught more as a "hobby" than any other reason, and that she was a good teacher. The Board presented no witnesses or documents against Kellner that she might cross-examine, and refused to give her written notice of the charges against her. The Board President stated that "We have decided in a previous meeting to postpone making a decision on these contracts until the June meeting."

In the second board hearing, of May 12, 1975, it was brought out that it was the policy of the Karnes City Independent School District that a teacher is not terminated, absent good cause:

MR. WATTS: So as I understand it, a teacher's contract is renewed if there is no good cause not to renew it, is that correct?

THE PRESIDENT: Right.

This policy is known to the teachers and the Superintendent has told them that such is the case.

The Board met in closed session. Ms. Kellner and her attorney were not allowed to be present, and had not been notified

that such closed session would occur. In the closed meeting, apparently certain conditions were discussed that she could have met had she known of their existence.

MR. WATTS: If there had not been good cause not to renew them then the contracts would have been renewed?

THE PRESIDENT: If they had met the stipulations, yes.

MR. WATTS: What stipulations?

THE PRESIDENT: That was in the discussion we had.

MR. WATTS: Well, what stipulations, I think we are entitled to know. I want to know what stipulations.

THE PRESIDENT: We are not going to get into that right now.

MR. WATTS: Well, when are we going to get in it?

THE PRESIDENT: The teachers have been counseled with the principal of the school, and they have had all opportunities, and actually there is no reason to continue this discussion.

Paragraph C, supra.

The pertinent written policies of Appellee District are:

IV. SCHOOL FACULTY

A. All school faculty members shall be selected on

the basis of their qualifications for best instructing pupils. They shall comply with minimum requirements of the Texas Education Agency for the work they are to perform. Assignments shall be made on a basis of qualifications of the teacher and the needs of the pupils and the school.

F. Teachers are to be re-elected at the first regular meeting in March of each year and must send in an acceptance of their re-election within 30 days after receipt of contract if they are to continue in the school system. Teachers agree that they will not ask to be released from their contract after July 1st of each year.

G. Teachers who are re-elected have been recommended by both Principal and Superintendent and are then approved or disapproved by the Board. A teacher who has not been re-elected shall be notified of this fact in writing and shall have the right of appeal to the Board upon written request within fifteen days after receiving a notice. The Board meeting will be a closed meeting unless the teacher requests an open meeting at the time of the request for the hearing. The teacher is entitled to counsel if he chooses. A teacher who has not been re-elected because of unsatisfactory work as a teacher should have been previously conferred with by the Principal or Superintendent. At this time the deficiencies of the teacher should have been pointed out by the Principal and/or Superintendent and the teacher given a chance to remedy these deficiencies if time permits before the end of the school year.

H. As required by state regulation, all professional personnel will be evaluated yearly by appropriate supervisory officials within the school system. In addition to this formal evaluation, teachers in grades six through twelve will be evaluated by groups of their students. The student evaluation will be used primarily as an instrument for discussion with the teacher's principal or superintendent and will not be filed in the teacher's personnel file. However, the formal evaluation will be made a part of the teacher's file and be available to the Superintendent, the Board of Trustees, the teacher's principal and to the teacher. Either the teacher or the school administration may request a second evaluation if it is deemed necessary. As soon as it is mutually agreeable after the evaluation takes place, the principal and teacher will jointly discuss the results of the evaluation, make any written comments on the back they might feel necessary for clarification, and sign the evaluation form. More detailed information will be given to each teacher by the principal of his/her building.

V.

FEDERAL JURISDICTION

The basis for Federal Jurisdiction in the United States District Court is:

A. 42 U.S.C., Section 1983;

B. The Fourteenth Amendment to the Constitution of the United States of America;

C. 28 U.S.C., Sections 1343, 1331, 2201 and 2202.

VI.

ARGUMENT

The only opinion thus far written in this case is that of the Federal District Court for the Western District of Texas, San Antonio Division (see attached Exhibit "A" for further references thereto). That opinion was rendered February 11, 1976 in support of the Court's Order granting Summary Judgment to Defendants in this case pursuant to Rule 56, Federal Rules of Civil Procedure. Hornbook law tells us that this rule is, of course, limited to that situation in which "there is no genuine issue of material fact and upon which the moving party is entitled to prevail as a matter of law." Wright, *Federal Courts*, 2nd Ed., p. 441. Petitioner contends that this Summary Judgment was improvidently granted and that this cause should be remanded for trial.

The first issue disposed of by the Court via Summary Judgment is the dismissal of the Karnes City Independent School District as a party defendant based on the *Kenosha* and *Ingram* cases, Exhibit "A", p. 3. Based on Petitioner's initial jurisdictional pleadings which included 28 U.S.C., Section 1331 as well as 1343, the more common jurisdictional counterpart of a 42 U.S.C., 1983 action; and alleging a cause of action against Defendant school district under the Fourteenth Amendment, this ruling should not stand. The Supreme Court has recently decided that when a Court relies on Section 1331 for jurisdiction, as here (Exhibit "A", page 2), then the action is not subject to the limitations which have been applied to the 1983 action. *Mt. Healthy City School District Board of Education v. Doyle*, Slip Op. No. 75-1278 (U.S. Supreme Court - January 11, 1977), at 4-5.

Aside from the jurisdictional issue, the essence of Petitioner's claim herein, is that Summary Judgment was neither appropriate nor proper as to Petitioner's alleged "property" and "liberty" interests.

The Court's analysis appears to be as follows:

1. Plaintiff (Petitioner herein) has offered to show more than "a mere subjective expectancy" which satisfies the *Roth* holding, Exhibit "A", p. 4;

2. Plaintiff *has* offered to prove "practices and policies promulgated by the Defendant school district to the effect that all teachers can expect to be renewed for employment absent a showing of good and sufficient cause" to satisfy the *Sinderman* holding, (Exhibit "A", at 4).

3. However, says the Court, "proof of such a property interest would not entitle the plaintiff to reinstatement." Exhibit "A" at 4-5. The Court concludes further that reinstatement is "a form of relief the Court could not provide *even if the allegations of the complaint were proven.*" Exhibit "A" at 5. Therefore, since the exclusive remedy available is a hearing before the Defendant Board, Plaintiff has not stated a prima facie case.

Nothing would seem to be further from the reality of current decisions in all circuits and of the Supreme Court as well. Volume alone prohibits a list of all the cases in which reinstatement has been awarded as equitable relief in a Section 1983 cause of action. The most recent example of our highest Court sanctioning such a remedy as appropriate (with back pay) is, again, the recent *Doyle* decision where the District Court was held to have applied an incorrect *test*, not an inappropriate remedy. *Doyle*, supra, at 8.

Clearly this is the error which is of central concern to Petitioner, just as it was to the District Court below. The error is prejudicial to Petitioner and must not be allowed to prevail.

Finally, the District Court granted Summary Judgment as to Petitioner's alleged "liberty" interest by finding that "favorable reputation" was, *as a matter of law*, not sufficiently alleged, so as to survive a summary adjudication. In support, it is suggested by the Court that the "veracity of the Board's reasoning has not been questioned." Exhibit "A", at 6. From this, the Court makes a factual determination that "good cause does exist for not reviewing the Plaintiff's contract." Exhibit "A" at 7.

As to this issue, Petitioner can only respond that this lawsuit should be a prima facie case of testing the Board's veracity and further, this is the very kind of "genuine issue of material fact" that must not be summarily adjudicated under our system of justice.

CONCLUSION

Petitioner would show that for reasons given hereabove, a writ of certiorari should issue to review the judgment and opinion of the court below, and that upon hearing of this cause, the decisions of the courts below be reversed and this cause reinstated for trial on the merits; in the alternative, Petitioner would show that judgment should be rendered for Petitioner and against Respondent, and that this Court should remand the matter to the trial court for determination of the appropriate relief under said rendered judgment.

Respectfully submitted,

Larry Watts Jr. In. a. S.

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(713) 526-0820

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument was mailed, this 3rd day of March, 1977, certified, return receipt requested, postage pre-paid to:

Mr. Emerson Banack, Jr.
FOSTER, LEWIS, GARDNER, LANGLEY & BANACK
1655 Frost Bank Tower
San Antonio, Texas

Mr. J. Michael Myers
GROCE, LOCKE & HEBDON
2000 Frost Bank Tower
San Antonio, Texas

Larry Watts per tm a.s.
LARRY WATTS

[1] [1]

EXHIBIT "A"

[1] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MS. ETTA LEE KELLNER	)	
	)	
V.	)	SA-75-CA-187
	)	
KARNES CITY INDEPENDENT	)	
SCHOOL DISTRICT, ET AL.	)	

ORDER

FILED: February 12, 1976
RECEIVED: February 14, 1976

On this the 11th day of February, 1976, came on to be considered the Motion to Dismiss for Failure to State a Claim filed by the defendants in the above styled and numbered cause pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure. The Order of this Court entered on November 14, 1975 converted this Motion under Rule 12 into a plea for Summary Judgment and set out time lines for the parties to submit to the Court any and all evidence which they wished the Court to consider under Rule 56, Federal Rules of Civil Procedure. The Court finds that these time lines are long since past and that all parties have had ample opportunity in which to submit their evidence in anticipation of a Rule 56 ruling.

The Court has reviewed the briefs, exhibits and pleadings of the parties together with the complete record and file of the

[1] [2]

case and is of the opinion and so finds that the Motion is meritorious and should be granted.

During the 1974-1975 school year the plaintiff was employed as a teacher by the Karnes City Independent School District. In the spring of 1975, the plaintiff was informed that the Superintendent of Schools had recommended that her one year contract not be renewed. After two meetings with the Board of Trustees, the Board voted not to renew the plaintiff's [2] contract allegedly on the grounds, among others, that she exercised poor judgment and poor class management. (Plaintiff's Complaint, page 3)

Plaintiff subsequently filed this action alleging violations of her rights by the defendants under 42 U.S.C., Sec. 1983, and the First and Fourteenth Amendments to the United States Constitution. Jurisdiction arises under 28 U.S.C., Sec. 1331.1/

Although jurisdiction does exist under 28 U.S.C., Sec. 1331, this Court is of the opinion that the provisions of 42 U.S.C., Sec. 1983, giving plaintiff a remedy do not apply to all the defendants named in this action. The authority that a School District is not a "person" within the meaning of Section 1983 is overwhelming. *City of Kenosh v. Bruno*, 412 U.S. 507, 513-514; *Ingram v. Wright*, Slip Opinion 73-2078 (Jan. 8, 1976) (en banc). It is clear, therefore, that the defendant, Karnes City Independent School District, is not a person subject to Sec. 1983 and it is hereby ORDERED that the Karnes City Independent School District be, and it is hereby, dismissed as a

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1/ Recognizing that diversity does not exist in this action, plaintiff has dropped her claim that jurisdiction arises under 28 U.S.C., Sec. 1332.

[2] [3]

party in this case because of the lack of subject matter jurisdiction.

Furthermore, it is uncontroverted from the pleadings and the exhibits that the only involvement of the defendant, Mrs. Mary Ahrens, with the determination of the School Board to not offer plaintiff a contract for the 1975-1976 school year was that of a recording secretary to the Board and, as such, she did not participate or contribute in any way to the Board's determination. Obviously, she had no active role in the alleged deprivation of the plaintiff's rights and it is, therefore, [3] ORDERED that the defendant, Mrs. Mary Ahrens, be dismissed from this cause as the plaintiff's complaint fails to state a claim against her upon which relief can be granted.

With regard to Messrs. Luthringer and Asman; the Court finds that even though they did not actively participate in the vote of the School Board their input into the teacher election process through recommendations to the Board would demand that they be held to the same degree of accountability as the individual members of the Board. (See Section IV G of the Policies and Regulations of the Board of Trustees of the Karnes City Independent School District requiring the recommendation of both the principal and superintendent before a teacher may be re-elected by the Board.) Therefore, the Motion to Dismiss as to them is DENIED.

In proceeding to a determination of the case under Rule 56, the hereinabove dismissed defendants are included in the Court's consideration and any ruling under Rule 56 shall apply to them as well.

The initial claim of the plaintiff is that she has acquired a "property" interest in her continued employment and that

this expectation goes beyond the mere subjective. In failing to renew her year to year contract, it is argued that the Board of Trustees has abrogated this "property" interest and violated the plaintiff's rights to procedural due process.

Plaintiff concedes, and the contract she accepted clearly demonstrates, that she had no formal tenure such as would entitle her to continued employment in the absence of sufficient cause.

> [4] "Thus, the terms of the [plaintiff's] appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the [plaintiff] surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972) (Emphasis in the original)

Realizing that a subjective expectation of continued employment would be an insufficient property interest to invoke the protections of the Fourteenth Amendment, the plaintiff has alleged that "pursuant to the rules and policies practiced and promulgated by the defendant district . . . all teachers in that district can expect to be renewed for employment absent a showing of good and sufficient cause." (Plaintiff's Complaint, page 3.) This allegation coincidentally recognizes the holding in *Perry v. Sindermann*, 408 U.S. 593 (1972), in which the

Supreme Court held that even in the absence of formal tenure, a teacher *might* be able to establish a property interest in re-employment cognizable under the Fourteenth Amendment.

> "A teacher, like the [plaintiff], who has held his position for a number of years, might be able to show from the circumstances of this service - and from other relevant facts - that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a 'common law of a particular industry or of a particular plant' that may supplement a collective-bargaining agreement, Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 579, so there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure." 408 U.S. at 603.

Superficially, therefore, plaintiff would seem to have alleged a claim sufficient to survive a Motion to Dismiss under Rule 12(b)(6).

The difficulty is that even "proof of such a property interest would not . . . entitle [the plaintiff] to reinstatement. But such proof would obligate college officials to grant a [5] hearing at [plaintiff's] request, where [plaintiff] could be informed of the grounds for . . . nonretention and challenge their sufficiency." *Perry*, supra, at 603. Plaintiff, however, in the case at hand, has failed to even allege that she has ever been denied such a hearing or that she wants one. 2/ Rather, the plaintiff

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2/ According to the uncontroverted evidence submitted by defendants, it is uncontested that plaintiff has as yet failed to accept an offer of the Board for a further hearing with regard to the non-renewal of her contract.

demands immediate reinstatement, a form of relief the Court could not provide *even if the allegations of the Complaint were proven.* It follows that the plaintiff has failed to state a claim upon which relief can be granted. *VanDe Vate v. Boling and the University of Tennessee*, 379 F. Supp. 925, 929 (D.C. Tenn. 1974); *Jones v. Hopper*, 410 F. 2d 1323 (10th Cir., 1969); *Orr v. Trinter*, 444 F. 2d 128 (6th Cir., 1971). It is elemental that before a plaintiff can succeed he must establish a prima facie case of discrimination on impermissible grounds. The plaintiff has failed to do so in the case at hand.

As is the case with "property" interests, the meaning of "liberty" under the Fourteenth Amendment has not infrequently been elusive. The word has been molded and shaped in an increasing number of judicial opinions, however, to the point where it has a recognizable meaning under the law.

Plaintiff has alleged that a favorable reputation is such a liberty protected by the Fourteenth Amendment and that the defendants have wrongly deprived her of such a reputation by terminating her employment and for other unnamed "constitutionally impermissible reasons". (Plaintiff's Complaint, page 4) It is true that the Courts have recognized that one's reputation can, [6] in certain circumstances, be a "liberty" subject to the full protection of due process. See *Roth*, supra. But the standard which the Court must apply in determining whether one has been deprived of this liberty is the degree to which one's reputation has been damaged. Stated in the negative, in an instance where the Court found no deprivation of liberty, the Supreme Court has concluded:

> "There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is

not such a case.

> "The State, in declining to rehire the [plaintiff], did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of *dishonesty, or immorality.* Had it done so, this would be a different case." *Roth*, supra, at 573.

Like Roth, the plaintiff has, as a matter of law, failed to demonstrate any damage to her reputation beyond the fact that her contract was not renewed.

The only facts alleged in support of the alleged deprivation of the "liberty" are some of the reasons stated by the Board of Trustees in support of their decision not to renew the plaintiff's contract, namely "poor judgment" and "poor class management". These alleged aspersions on the plaintiff's ability or performance as a teacher are no more injurious to the plaintiff's reputation than the fact of non-renewal itself and clearly do not amount to a deprivation of liberty within the meaning of the Fourteenth Amendment, but rather are direct indications that the Board's decision not to renew the contract was based on good cause and not malevolence or caprice. The veracity of the Board's reasoning has not been questioned by the plaintiff or in any way brought into issue in this case and [7] on the face of the allegations alone the Court finds that good cause does exist for not renewing the plaintiff's contract.

While the Complaint also states that the "action is brought pursuant to the . . . First Amendment . . ." (Plaintiff's Complaint, page 1) no facts or cause of action are advanced in support of this statement.

For the reasons heretofore stated, the Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted, as altered by the Court's Order of November 14, 1975 converting it into a Motion for Summary Judgment, is hereby in all things GRANTED and Judgment is entered with costs for the defendants, Karnes City Independent School District, M. E. Asman, D. R. Luthringer, James McClane, Mary Ahrens, Marvin Witte, Alois Linhart, Hilmer Wagener and Kenneth Matthews.

ORDERED AND ENTERED this 11th day of February, 1976.

/s/ John H. Wood, Jr.
JOHN H. WOOD, JR.
UNITED STATES DISTRICT JUDGE